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Supreme Court, U.S.
FILED

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

OCTOBER TERM 1998

JOHN DOE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

* *

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES OF AMERICA

FOR THE FIRST CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

* *

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40pp

QUESTIONS PRESENTED

1. Is an order of the district court remanding to the state courts a state criminal case that had been removed pursuant to 28 U.S.C. sec. 1442 (a)(1) raising issues of civil rights violations as set out and contained in 28 U.S.C. sec. 1443 reviewable by the Circuit Court of Appeals?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the First Circuit are those identified in the caption.

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No._____

* *

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1998

JOHN DOE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

* *

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

* *

The petitioner John Doe herein respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS DELIVERED BELOW

The opinion of the District Court for the District of Massachusetts and the opinions of the United States Court of Appeals are hereto annexed and marked Appendix "C", "D" and "E". See pages 31, 32 and 34 respectively. Petition for Removal and Petitioner's Brief on appeal are hereto annexed and marked Appendix "A" and "B". See pages 8 and 13 respectively.

BASIS FOR JURISDICTION

The final judgement of the United States Court of Appeals for the First Circuit denying the petitioner's removal from the state court to the federal court was entered on November 10, 1998. See page 32 App. D. A timely petition for rehearing en banc was denied on December 15, 1998. See page 34 App. E. The jurisdiction of this court rests upon 28 U.S.C §1447(d) and Supreme Court Rule 10.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442(a)(1)

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending;

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or an account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment

of criminals or the collection of the revenue.

28 U.S.C. § 1443

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the District Court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1446(c)(1)

§ 1446.Procedure for removal

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States District Court may enter an order granting the defendant or defendants leave to file the notice at a later time.

28 U.S.C. § 1447(c)(d)

§ 1447. Procedure after removal generally

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made

within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the state court. The state court may thereupon proceed with such case.

(d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

The facts of the case are essentially contained in the petitioner's petition for removal annexed hereto and marked Appendix "A", page 8.

A brief statement, pertinent to the issues presented herein, is that the petitioner was a long-time informant for the federal authorities. He worked under the direction of federal agents and at one point was directed to become involved with certain individuals for purposes of obtaining information for a drug prosecution by the federal government.

The petitioner became involved as directed and was indicted by the Commonwealth of Massachusetts for his conduct engaged in as a federal informant. The state authorities refused to be bound by the federal government's promise of immunity to the petitioner.

Prior to trial the petitioner removed the state criminal case to federal court pursuant to the procedural dictates of 28 sec. 1446 & 1442(a)(1) alleging, among other things, violation of the petitioner's civil rights by the state under color of law.

CERTIORARI SHOULD BE GRANTED IN THAT THE COURT OF APPEALS DEPARTED FROM LONG-SETTLED LAW AND DEVELOPED NEW RULES THAT IT APPLIED ONLY TO PETITIONER

Upon a reasoned and studied professional judgment, the decision in this case is contrary to the following decisions of the United States Court of Appeals for the First Circuit in FDIC v. Cabral, 989 F.2d 525 (1st Cir. 1992); United States v. Allard, 926 F.2d 1237, 1244 (1st Cir. 1991); and the Supreme Court of the United States in Things Remembered Inc. v. Petrarca, 516 U.S. 124 (1995), and Certiorari is necessary to secure and maintain uniformity of decisions in this Court, see Jackson v. Virginia, 443 U.S. 307 (1979); Fuller v. Anderson, 662 F.2d 420 (6th Cir. 1981); and Stacy v. Love, 679 F.2d 1209 (6th Cir. 1982), cert.denied, 459 U.S. 1009 (1982).

The Circuit Court issued an order dismissing the petitioner's appeal from the remand order of the district court case for lack of jurisdiction announcing that under 28 U.S.C.s 1447(d) "...an order remanding a case to state court, 'is not reviewable on appeal or otherwise.'"

The court recognized that the exception to this rule was a "...civil rights case[s] removed under 28 U.S.C.s. 1443..."

In the order the court stated that the [petitioner] had attempted to remove the proceedings pursuant to 28 U.S.C. 1442(a)(1)

and that the district court remanded on the ground that the removal petition had not been timely filed. The court went on to hold that the action of the district court could not be reviewed because except for a civil rights action brought pursuant to 28 U.S.C. 1443, section 1447(d) prevented review.

The Circuit Court in its order has confused a substantive statute with a procedural statute and form with substance. Clearly, 28 U.S.C. § 1443 sets forth the substance of a civil rights violation but, does not set out any procedures for filing a removal. Section 1446 sets forth the procedure for removing the state action to federal court. Section 1446 does not set out any substantive rights but rather is the vehicle to remove a state case to federal court for various substantive violations, amongst which is a violation of civil rights. See FDIC v. Cabral, supra, in which the removal was brought pursuant to 1446 but the underlying substance was a violation of FDIC statues.

Section 1446 states, in pertinent part:

§1446. Procedure for removal

°(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

° (b) The notice of removal of a civil action or proceeding

> shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

The section is clearly labeled "procedure for removal", thus it is apparent that when the petitioner cited section 1446 as the jurisdiction for removal, he was only citing the procedural statute.

The facts set forth in the complaint for removal filed in the district court and in the petitioner's brief in Circuit Court spell out that his underlying grievance and the violation complained of are both civil rights violations. Granted, he did not state that he was removing the case because of a violation of section 1443, but without citing the statute, the petitioner has set out a civil rights violation.

The effect of a failure to comply with the technicality of citing section 1443 should not preclude the petitioner from having this court review the district court's remand decision in a case such as this, wherein the complaint is clearly a

civil rights violation.

Courts, including the First Circuit, have held on numerous occasions that courts generally "should not exalt **form** over **substance** but should look to the reality of the situation as opposed to the ritual." United States v. Allard, 926 F.2d 1237, 1245 (1st Cir. 1991).

In this case, as set forth in the removal complaint, the brief filed in the Circuit Court, and the papers herein, the petitioner has been denied his civil rights under color of law and the district court's remand is reviewable in the Appeals Court.

CONCLUSION

Based upon the foregoing arguments and authorities, upon the brief and exhibits previously filed in this court, and upon the record in the case at bar, the petition for a writ of certiorari should be granted.

Respectfully submitted,
John Doe
by his attorney

Dated:

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Commonwealth of Massachusetts	)
v.	)
John Doe	)

NOTICE OF REMOVAL

NOW COMES the defendant in the above-captioned matter, pursuant to 28 U.S.C. Sec. 1446, and removes the criminal prosecution pending in Middlesex County, Massachusetts, to the United States District Court for the District of Massachusetts at Boston. As grounds for this removal, defendant states as follows:

Factual Background

1. The defendant was arrested by the Massachusetts State Police in Medford, Massachusetts on September 14, 1995 and charged with Possession with Intent to Distribute Cocaine and Conspiracy to distribute cocaine.

2. At the time of his arrest, defendant asked to speak privately with one of the officers in charge, and did so, concerning his cooperating with "authorities." See Attachment 1.

3. On November 5, 1995, defendant was indicted on one count of Possession with Intent to Distribute Cocaine and two counts of Conspiracy to Distribute Cocaine. See Attachments 2a, 2b and 2c.

4. At all times pertinent hereto after September 14, 1995, defendant did not relate to anyone, including defense counsel, that he had been working with the F.B.I. as an "operative" for a period of approximately seven years.

5. Over the foregoing seven-year period, defendant caused several arrests to be made which resulted in convictions in the United States District Court for the District of Massachusetts.

6. On January 27, 1998, defense counsel filed a Motion to Produce 302 Reports and/or any other reports which the federal government had regarding the defendant.

7. After the motion was filed, the assistant district attorney contacted the "feds" and was advised that before any documents would be turned over, the defendant had to sign a waiver of the information contained therein. See Attachments 3a, 3b and 3c.

8. This information was relayed to defense counsel and the defendant. In the meantime, the defendant was contacted by his F.B.I. "handler" and advised not to sign the wavier, notwithstanding that defense counsel was advising him to sign it. The defendant refused to sign the waiver and no reports came from the federal government concerning the defendant.

9. During the course of defendant's case, defendant was continually advised by his F.B.I. "handler" to <u>not</u> disclose his F.B.I. activities to defense counsel.

10. During the course of defendant's case, defendant was continually given legal advice by his F.B.I. handler.

11. Subsequent to September 14, 1995, and up to and including May of 1998, defendant continued to "operate" in an undercover capacity at the behest of the F.B.I., which information he only recently relayed to defense counsel.

12. On April 7, 1998, through defense counsel, defendant advised the Middlesex County District Attorney's Office of the "role" defendant had been playing under the management, direction and control of the F.B.I.

13. As a result of relaying the foregoing to the District Attorney's Office, defendant's counsel and an assistant district attorney met with the trial judge, who continued trial from April 13, 1998 to June 29, 1998, to give both the defense and prosecution the opportunity to examine and confirm the nature and extent of defendant's activities with the F.B.I.

14. Defendant was subsequently de-briefed by the District Attorney's Office over a three-day period, in the course of which defendant fully disclosed his activities with the F.B.I.

15. During his de-briefing, defendant advised the District Attorney's Office that he was aware that both a pen register and a wiretap had been placed on his phone, during the course of the investigation in 1995, which information he received from the F.B.I., prior to the taps being placed. However, during the investigation in 1995, the District Attorney's Office advised the United States Attorney's Office that there was an ongoing investigation of defendant but no information regarding the defendant's activities was relayed to the District Attorney's Office.

16. After the de-briefing, the District Attorney's Office informed counsel that it would continue to prosecute defendant and that if the "feds" wished to do something they could.

17. At all times pertinent hereto, Middlesex County, the F.B.I. and the local police had a joint task force as to drug cases, which task force conducted investigation by federal, state and local authorities.

Basis for Removal

18. At all times pertinent hereto, defendant had federal immunity from prosecution and was acting within the scope of that immunity. In that the defendant's conduct which is the basis for the State's indictment was conduct authorized by the federal government, the State has violated his federal immunity and deprived him of equal protection and due process.

19. Defendant and his family would be at great risk for their personal safety if the defendant's work with the F.B.I. was publicly disclosed, which disclosure is more likely in the state court if defendant is forced to continue with the case.

20. Defendant stands to be punished severely if he is prosecuted in the state court and he is not entitled to many crucial confidential documents in the possession of various federal authorities and protected by 28 C.F.R. 2.56, 16.21 et seq.

21. Defendant is incapable of defending himself in the state court in that the case is tainted by the F.B.I. operative's pervasive undue influence in the defense of the case and the denial of effective assistance of counsel.

22. As a result of the legal advice given to defendant by his F.B.I. handler, he was denied his Sixth Amendment right to effective assistance of counsel.

23. The advice by the F.B.I. violates the defendant's attorney-client relationship and interferes with the defense; in addition, such advice is designed to prevent a disclosure by the F.B.I. of the nature of the defendant's role as an informant and, perhaps, ongoing investigations by the federal government.

24. Defendant is being used as a "scapegoat" by the Middlesex District Attorney's Office, in that the office continues to prosecute defendant in retaliation for the federal government's meddling into its case and disclosing information to defendant.

25. In light of the joint task force which conducted the investigation, the Middlesex District Attorney is, in effect, violating an immunity grant to his own informant, thereby denying him equal protection and due process, and must dismiss the case against the defendant.

WHEREFORE, defendant respectfully requests that this Honorable Court:

A. Remove the case to this Court pursuant to 28 U.S.C. Sec. 1446;

B. Order an evidentiary hearing;

C. Grant whatever further relief this Court deems mete and just.

Dated: June 12, 1998

Respectfully submitted,
Attorney for the Defendant

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS
Appellee

v.

JOHN DOE
Defendant-Appellant

No. 98-2032

BRIEF FOR DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The basis for subject matter jurisdiction in the district court is 28 USC 1446. The defendant was charged with state crimes, namely possession of cocaine with intent to distribute and conspiracy to distribute cocaine, in the Middlesex Superior Court. At the time of his arrest and at all times pertinent hereto, the defendant was operating under color of federal law, in that he was operating in an undercover capacity at the direction and control of the Federal Bureau of Investigation (FBI).

The bases for subject matter jurisdiction in the court of appeals are 28 USC 1446, and the due process provisions and Sixth Amendment of the United States Constitution. The district court dismissed the within matter on July 21, 1998 and defendant filed his Notice of Appeal on August 4, 1998, which notice was filed within thirty days of the court's decision, as required under the Federal Rules of Civil Procedure. This appeal is from a final order of dismissal in the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether defendant filed his Notice of Removal in a timely fashion, pursuant to 28 USC 1446.

2. Whether defendant's Notice of Removal adequately states a colorable claim to a federal defense and/or a causal connection between his acts and the state prosecution, specifically:

   a. Whether the grand jury proceeding was impaired by distorted, misleading and erroneous testimony that intended to imply the defendant had the mens rea to commit the crimes charged when in fact he was authorized and empowered by law enforcement officials to engage in the criminal conduct as an agent of the federal government; and

   b. Whether the grand jury indicted defendant on insufficient, tainted and incompetent evidence presented as a result of gross prosecutorial misconduct in that at all times pertinent the defendant was acting under color of federal law and in that an agent of the United States government was presenting evidence that defendant committed state crimes to a state grand jury .

3. Whether defendant was denied effective assistance of counsel as a result of the pervasive and prolonged undue influence by the Federal Bureau of Investigation (FBI) on the defense of the case.

STATEMENT OF THE CASE

The defendant was arrested by the Massachusetts State Police in Medford, Massachusetts on September 14, 1995 and charged with Possession with Intent to Distribute Cocaine and Conspiracy to distribute cocaine. At the time of his arrest, defendant asked to speak privately with one of the officers in charge, and did so, concerning his cooperating with "authorities." See Appendix, pages 13-14. Kurt Schwartz, who was an Assistant Middlesex District Attorney and also cross-designated as an Assistant United States Attorney, presented evidence to a Middlesex County Grand Jury, neglecting to inform the jury that at all times pertinent to the case defendant was working in an undercover capacity for the FBI. On November 5, 1995, defendant was indicted on one count of Possession with Intent to Distribute Cocaine and two counts of Conspiracy to Distribute Cocaine. See Appendix, pages 20-25.

At all times pertinent hereto after September 14, 1995, defendant did not relate to anyone, including defense counsel, that he had been working with the FBI as an "operative" for a period of approximately seven years. Over the foregoing seven-year period, defendant caused several arrests to be made which resulted in convictions in the United States District Court for the District of Massachusetts. On January 27, 1998, defense counsel filed a Motion to Produce 302 Reports and/or any other reports which the federal government had regarding the defendant. After the motion was filed, the assistant district attorney contacted the "feds" and was advised that before any documents would be turned over, the defendant had to sign a waiver of the information contained therein. See Appendix, pages 15-

19. This information was relayed to defense counsel and the defendant. In the meantime, the defendant was contacted by his FBI "handler" and advised not to sign the wavier, notwithstanding that defense counsel was advising him to sign it. The defendant refused to sign the waiver and no reports came from the federal government concerning the defendant. During the course of defendant's case, defendant was continually advised by his FBI "handler" to not disclose his FBI activities to defense counsel. During the course of defendant's case, defendant was continually given legal advice by his FBI handler.

Subsequent to September 14, 1995, and up to and including May of 1998, defendant continued to "operate" in an undercover capacity at the behest of the FBI, which information he only relayed to defense counsel in the spring of this year. On April 7, 1998, through defense counsel, defendant advised the Middlesex County District Attorney's Office of the "role" defendant had been playing under the management, direction and control of the FBI. Defendant was subsequently de-briefed by the District Attorney's Office over a three-day period, in the course of which defendant fully disclosed his activities with the FBI. After the de-briefing, the District Attorney's Office informed counsel that it would continue to prosecute defendant and that if the "feds" wished to do something they could.

At all times pertinent hereto, Middlesex County, the FBI and the local police had a joint task force as to drug cases, which task force conducted investigations by federal, state and local authorities, and at all times pertinent hereto, Assistant District Attorney Kurt Schwartz was cross-designated as an Assistant United States Attorney.

On June 12, 1998, defendant, through counsel, filed a Notice of Removal pursuant to 28 USC 1446. See Appendix, page 8. On June 30, 1998, a hearing on the Notice of Removal was held before Judge Joseph Tauro in the district court. On July 21, 1998, the Notice of Removal was dismissed. See Appendix, page 65.

SUMMARY OF ARGUMENT I

Defendant has filed his Notice of Removal within the time limits proscribed by 28 USC 1446(c)(1), in that his federal issue did not yet exist at the time of his original arrest and indictment. Rather, his federal issue was triggered by the actions of both the state prosecutor and federal agents in May and June of 1998.

To the extent that defendant did not file his Notice of Removal in a timely fashion under 28 USC 1446(c)(1), his notice is still valid pursuant to the statute's "good cause" exception.

SUMMARY OF ARGUMENT II

Defendant's Notice of Removal more than adequately states both a colorable claim to a federal defense and a causal connection between his conduct under federal authority and the state prosecution.

ANALYSIS I

28 USC 1446 sets forth the procedures to be followed by a criminal defendant in removing a state criminal prosecution to the federal court. Specifically, 28 USC 1446(c)(1) provides that "a notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the state court, or at any time before

trial, whichever is earlier, except that for good cause shown, the United States District Court may enter an order granting the petitioner leave to file the notice at a later time."

Because the notice of removal process is civil in nature, the Federal Rules of Civil Procedure apply. This is true even though a criminal case may be the underlying case removed. Generally, the right to remove a state case to the federal court must be filed within thirty days of perfected service of process. See Hill v. City of Boston, D.Mass. 1989, 706 F.Supp. 966. And this thirty day requirement is usually strictly enforced. see Diaz v. Swiss Chalet, D.C. Puerto Rico, 1981, 525 F.Supp. 249, and also Touche Ross & Co. v. Manufacturers Hanover Trust Co., D.C.N.Y. 1980, 503 F.Supp. 222. Thus, the defendant is required to demonstrate "good cause" to the court, to prevail under 28 USC 1446(c)(1).

When a plaintiff, by a voluntary act, interposes a federal question that did not appear in the complaint as originally filed, the defendant may remove the case to federal court. See Federal Deposit Insurance Corp. v. Otero, C.A.1 (Puerto Rico) 1979, 598 F2d 627. Also, in Johnson v. Celotex Corp., D.MD. 1988, 701 F.Supp. 553, the court held that if a case becomes removable during or even near the end of a state court's trial, the defendant may still exercise his right to remove to federal court.

If the case stated by the initial pleading is not removable, notice of removal may be filed within thirty days after receipt by the defendant of notice from which it may first be ascertained that the case is one which is or has become removable, and this exception to the general rule that notice of

removal must be filed within thirty days after receipt by defense of copy of initial plea assures a laudable purpose of preventing the defendant from having to speculate whether a case is removable, and it also functions as a deterrent to a plaintiff seeking to disguise the true federal character of a claim. See Akin v. Big Three Industries, Inc., E.D. Tex. 1994, 851 F.Supp. 819.

ARGUMENT I

In the case at bar, defendant was arrested and arraigned in September of 1995. From that date up until April of 1998, defense counsel were unaware of defendant's relationship with the FBI; see attached Affidavits of Alan Chapman and Henry D. Katz at Appendix, pages 53 and 54. During the period between September of 1995 and April of 1998, the FBI maintained contact with defendant and advised him not to reveal his relationship with them to anybody, including his attorneys (see Affidavit of Vincent Ricci, Appendix, page 34 et seq., especially at page 49). Present counsel was not advised of defendant's relationship with the FBI until April of 1998. See Notice of Removal, Appendix, page 8 et seq. Defense counsel and defendant thereupon met with the state prosecutor. Both the prosecutor and defense counsel immediately notified the state court and attempted to determine the nature and extent of the defendant's relationship with the FBI. The state prosecutor, notwithstanding that he determined that defendant had a long relationship with the FBI (five years) and notwithstanding that he himself is a "cross-designated Assistant United States Attorney", decided to proceed with the state prosecution. Defense counsel then filed the Notice of Removal, which defendant argues was timely filed pursuant to

the statute. Because defendant was in the "clutches" of the FBI and assured by them that they would come to his rescue at the appropriate time (see Affidavit of Vincent Ricci, page 34 et seq.), defendant did not advise his counsel of his relationship, thus being effectively denied legal counsel as contemplated by the Sixth Amendment. Surely this is good cause within the meaning of 28 USC 1446(c)(1). Up to May of 1998, defendant had no knowledge that his case was removable because up until that time he expected the FBI to intervene in his behalf. Further, once the state prosecutor/cross-designated Assistant United States Attorney became aware of defendant's relationship, he arguably should have moved to dismiss the indictment. Failing to do that "triggered" defendant's federal issue and therefore his thirty day tolling under the statute did not commence until defendant was so notified. Defendant, up until that point in time, was operating on the good faith assumption that the FBI would come to his aid. This worked hand and glove with his ineffective assistance of counsel. Thus, on both bases his federal issue did not present itself until May or June of 1998.

So, arguably, the defendant did comply with the thirty day tolling of 28 USC 1446(c)(1), but to the extent he did not, he certainly comes within the good cause exception. Lastly, it is respectfully argued that if a defendant and his family are at risk for their health, safety and well-being, as surely they are in this case, then failure to come forward with a disclosure that he was working with the FBI is good cause. Part of the reason the FBI agents who handled defendant were so successful in keeping him from informing his own lawyers as to what was going on was the statements made by them that the only way he or his family could be assured of safety was by not revealing his

assistance. Surely that is good cause.

ANALYSIS II

Under 28 USC 1446, the defendant must satisfy two elements in order to remove his case from state to federal court. First, the defendant must raise a colorable claim to a federal law defense; see Mesa v. California, 489 US 121 (1989). Second, the defendant must establish that there is a causal connection between what he has done under the direction of a federal officer and the state prosecution; see Maryland v. Soper (No. 1), 270 US 9 (1926); see also Ryan v. Dow Chemical Co., 781 F.Supp. 934 (E.D.N.Y. 1992), where it was held that the defendant must prove that the acts which the state alleges are criminal were undertaken by him under authority of a federal officer, and that those acts were under color of the relevant federal office.

ARGUMENT II

Defendant has established that he has a colorable claim to a federal defense pursuant to the analysis as set forth above. The conduct of the defendant which is the basis for the state's indictments was conduct authorized by the federal government. See Affidavits of Joanna Ricci, Camille Ricci and Vincent Ricci (generally, at Appendix, pages 26, 32 and 34, respectively, and in particular, paragraphs 93-96 of Vincent Ricci's affidavit, at Appendix, page 47). By charging defendant with a crime, the state is violating federal immunity given by the federal government and thus depriving defendant of equal protection and due process as guaranteed by the United States Constitution. See also attached exhibits at Appendix 67-75, wherein the defendant was investigated by the FBI and determined to be

a suitable "operative." Further, see Appendix 76-81, wherein defendant received payment and reimbursement. At all times he was working with the FBI in an undercover capacity, the drugs used were provided by defendant and not the federal government. Defendant's role as an undercover operative was to be a "drug dealer" and set-up for arresting real drug dealers. By all accounts, Mr. Ricci was very good in his undercover capacity. See Appendix, pages 72-81, especially at page 77, wherein the government is praising his work, and wherein Mr. Ricci's activities are reported by federal agents.

In addition to the foregoing, subsequent to his arrest, Mr. Ricci continued to have contact with his FBI handlers. See Affidavits of Camille Ricci, Appendix, page 32, and Vincent Ricci, Appendix, page 34) and was advised not to reveal his status to his defense counsel. Mr. Ricci complied with the request and did not reveal his status until April of 1998 to his defense counsel. This advice not only interferes with the attorney-client privilege but also interferes with the attorney-client relationship, thus denying defendant effective assistance of counsel. But in the present matter before the court, perhaps of more significance in that the advice given Mr. Ricci by his FBI handlers, that is, not to reveal his status, was designed to prevent disclosure by the FBI of the nature of the defendant's role as a cooperating individual and thus prevent ongoing investigations from being impeded or thwarted.

Lastly, defendant argues that the Assistant District Attorney (Kurt Schwartz) who presented evidence to the grand jury and also is currently prosecuting his case, is a cross-designated Assistant United States

Attorney and thus, as a federal officer, is in effect violating an immunity grant to his own informant.

CONCLUSION

The defendant has filed his Notice of Removal in a timely fashion as required by 28 USC 1446(c)(1) and to the extent, if any, that it is not timely filed, defendant has demonstrated good cause.

The defendant has established both a colorable claim to a federal defense and a causal connection between his conduct under federal authority and the state prosecution, therefore, the case should be remanded to the district court for further proceedings.

Dated: October 28, 1998

Respectfully submitted,
Attorney for the Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed two copies of the within brief and one copy of the appendix to ADA Kurt Schwartz, Middlesex District Attorney's Office, 40 Thorndike Street, Cambridge, MA 02141.

Paul J. Haley, Esquire

RELEVANT STATUTE - 28 USC 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice or removal signed pursuant to > Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed amended pleading, motion, order or other paper from which is may first be ascertained that the case is one which is or has become removal, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment on the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a

later time.

(2) A notice or removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and nay exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the

State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *
Plaintiff *
v. *
*
JOHN DOE, Defendant *

Criminal No. 98-10193-JLT

ORDER
JULY 21, 1998

TAURO, Ch. J.

The court hereby orders as follows:

1. On the basis of the record before the court at this time and in accordance with the court's June 30, 1998 order, Plaintiff's Motion for Summary Remand (Docket # 3) is ALLOWED, and Defendant's Motion to Extend Time to File Additional Documents by sixty Days (Docket # 7) is DENIED;

2. As explained at the June 30, 1998 hearing, this court does not have jurisdiction to order any discovery. See Ruffin v. Armco Steel Corp., 959 F. Supp. 770, 772 (S.D. Tex 1997). Accordingly, Defendant's Motions to Compel Discovery Pursuant to FRCP, Rules 26 and 37, and Local Rule 37.1 (Docket # 8) and to Compel Brady Discovery (Docket # 9) are DENIED;

3. Defendant's Motion to Seal Notice of Removal (Docket # 2) is DENIED, but Defendant's Motion to Seal All Documents (Docket # 6) is ALLOWED in part, and DENIED in part. Only the affidavits of Joanna Ricci, Vincent Ricci, and Camille Ricci (Docket ## 12-14) will be sealed; and

9. This case is hereby DISMISSED.

IT IS SO ORDERED.

Chief United States District Judge

United States Court of Appeals
For the First Circuit

No. 98-2032

COMMONWEALTH OF MASSACHUSETTS,

Appellee,

v.

JOHN DOE,

Defendant, Appellant.

Boudin, Circuit Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

ORDER OF COURT

Entered: November 10. 1998

Appellant, facing criminal charges in Massachusetts state court, attempted to remove the proceedings to federal district court under 28 U.S.C. § 1442 (a)(1). The district court summarily remanded the matter to state court on the ground that the notice of removal had not been timely filed. See id. § 1446 (c)(1). Appellant now seeks to appeal from this ruling--contending among other things that "good cause" existed for the tardy filing inasmuch as various alleged actions by government personnel had prevented him from advancing his federal defense at an earlier point. He also requests that the upcoming state trial be stayed pending disposition of his appeal. We lack jurisdiction to review the order of remand.

The stay motion will this be denied and the appeal dismissed.

With the exception of civil rights cases removed under 28 U.S.C. § 1443, an order remanding a case to state court "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). This bar on appellate review applies to cases remanded on the grounds specified in § 1447(c)--i.e., for lack of subject matter jurisdiction or a 'defect' in the removal procedure. See, e.g., Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-12 (1996; Thermtron Prods., Inc. v. Hermansdorfer, U.S. 336, 346 (1976). A remand order based on "grounds of untimely removal" is "precisely the type of removal defect contemplated by § 1447(c)." Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995); accord, e.g., FDIC v. Cabral, 989 F.2d 525, 525 (1st Cir. 1992) (per curiam). No basis exists for invoking the exception for civil rights cases removed under § 1443. Appellate jurisdiction is thus lacking.

In connection with this appeal, the Boston Herald has sought to intervene for the limited purpose of moving to unseal the district court record. We note that the documents in question have now been filed in state court and ordered sealed by the presiding judge. Any unsealing of such papers by this court would constitute an improper interference with the state court proceedings. Those portions of the record ordered sealed by the district court shall thus remain under seal, without prejudice to the right of the state court now and in the future to order the sealing or unsealing of all papers within its control.

Appellant's motion for stay is denied. The motion of the Boston Herald to intervene is allowed, but its motion to unseal is denied. Appellant's motion to seal brief and appendix is allowed. The appeal is summarily dismissed for lack of jurisdiction. See Loc. R. 27.1. Mandate shall issue forthwith.

By the Court:

PHOEBE MORSE

Clerk.

[Cert. Copy to Judge Tauro and Tony Anastas, Clerk, United States District Court for the District of Massachusetts]

[cc: Messrs. Haley, Schwartz, Gemma and Henderson]

United States Court of Appeals
For the First Circuit

No. 98-2032

UNITED STATES,

Appellee,

v.

JOHN DOE,

Defendant, Appellant.

Before
Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
Selya, Boudin, Stahl, Lynch and Lipez,
Circuit Judges.

ORDER OF COURT

Entered: December 15, 1998

The petition for rehearing and suggestion for rehearing en banc are denied. See, e.g., Georgia v. Rachel, 384 U.S. 780, 792 (1966).

By the Court:

PHOEBE MORSE

Clerk.

[cc: Messrs. Haley, Henderson, Gemma and Schwartz]